Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

KEYTON BARKER AND PAULINE BARKER, *et al.*,

Petitioners,

v.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE; SECRETARY OF REVENUE OF THE STATE OF KANSAS; AND DIRECTOR OF TAXATION OF THE STATE OF KANSAS,

Respondents.

On Writ Of Certiorari to the Supreme Court Of Kansas

BRIEF OF ARIZONA, ARKANSAS, GEORGIA, IOWA, MONTANA, OKLAHOMA, UTAH, VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief in support of Kansas is submitted on behalf of Arizona, Arkansas, Georgia, Iowa, Montana, Oklahoma, Utah, Virginia and Wisconsin pursuant to United States Supreme Court Rule 37.

The question presented in this case was generated by this Court's decision in *Davis v. Michigan Department of the Treasury*, 489 U.S. 803 (1989) ("*Davis*"), relating to the taxation of federal, state and local government retirement benefits. The effect of the Court's decision in *Davis* was not only to undo certain aspects of the income tax structure in at least twenty-three states but also to raise the issue of under what circumstances these states must refund taxes previously imposed.

This case is thus an example of how a single United States Supreme Court decision declaring a state tax unconstitutional can profoundly affect the tax structure in numerous other states and impose an unanticipated liability on such states. For these reasons, amici curiae have a direct and abiding interest in the present case.

SUMMARY OF ARGUMENT

Amici curiae urge this Court to affirm the ruling of the court below that 4 U.S.C. § 111 as interpreted in *Davis* does not invalidate Kansas' differential tax treatment of the pay of federal military retirees and the retirement benefits of state and local government retirees. Should this Court not affirm the ruling of the court below, amici curiae urge this Court to expressly reserve the question of

the retroactivity of its decision until the issue can be fully briefed and argued. The retroactivity question presents an issue of particular complexity based on shifting Supreme Court plurality opinions, and its resolution could have a massive financial impact on parties not present or represented.

ARGUMENT

I. STATES MAY, CONSISTENT WITH *DAVIS*, TREAT MILITARY RETIREMENT PAY DIFFERENTLY FROM STATE AND LOCAL GOVERNMENT RETIREMENT BENEFITS.

Amici curiae adopt and fully support the argument of Respondents that the Court's *Davis* decision should not be expanded to invalidate the differential state taxation between federal military retirees and the retirement benefits of civil state and local government retirees. As shown in Respondents' brief, significant differences in these two categories of taxpayers justify such treatment under the test set forth in *Davis* for application of 4 U.S.C. § 111. Amici curiae therefore urge the Court to affirm the ruling below. Should the Court decide that a state's tax system may not, consistent with *Davis*, include such a differential tax treatment, amici curiae ask, in that case, that the Court expressly reserve the question of the retroactivity of such a holding.

II. CERTIORARI WAS NOT GRANTED ON THE ISSUE OF RETROACTIVITY, AND THE COURT SHOULD EXPRESSLY RESERVE THAT ISSUE.

The sole question decided by the courts below and presented to this Court in the Petition for a Writ of Certiorari is "whether the Kansas Income Tax Act violates constitutional or statutory principles of intergovernmental tax immunity, as recently applied in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). . . . " Petition for Writ of Certiorari at i. Because the courts below held that the differential tax treatment under the Kansas Income Tax Act did not violate the doctrine of intergovernmental tax immunity as applied in *Davis* and thus granted summary judgment to defendants, they did not address the question of refunds or the retroactivity of *Davis*.

While the retroactivity issue, therefore, is not presented in this case, this Court in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) ("*Beam*"), made two statements that are of significant concern to amici curiae in the context of this case. First, Justice Souter in his opinion stated that the remand of *Bacchus Imports, Ltd v. Dias*, 468 U.S. 263 (1984), for consideration of a defense raised by the state on the question of refunds "could be fairly read" as an *implicit* ruling by the Court that *Bacchus* applied retroactively. 111 S. Ct. at 2445. To avoid a similar disposition in this case, amici curiae urge that any remand order issued by this Court expressly state that the Court is not ruling on the question of retroactivity.

The second statement in *Beam* of concern to amici curiae is the statement by Justice Souter that "[b]ecause the *Bacchus* opinion did not reserve the question whether

its holding should be applied to the parties before it, . . . it is properly understood to have followed the normal rule of retroactive application in civil cases." 111 S. Ct. at 2445. To the extent that this statement indicates that any decision of the Court is retroactive unless the Court expressly reserves the question, amici curiae urge this Court expressly to reserve the question of the retroactivity of its decision in this case. The Court may effectively reserve the question either by so stating in any remand order or by retaining jurisdiction and setting the retroactivity issue for additional briefing and argument. Reservation of the retroactivity issue is appropriate in this case because of the vast reach of the *Davis* decision and the massive financial impact that such a ruling could have on the affected states.

On March 28, 1989, the Court decided *Davis*, holding that states may not, consistent with the intergovernmental tax immunity doctrine embodied in 4 U.S.C. § 111, provide a state income tax benefit to state and local government retirees without providing the same benefit to federal government retirees. At the time of the *Davis* decision, at least twenty-three states had statutes similar to the Michigan statute invalidated in *Davis*. Many of the statutes had been in effect and unchallenged for nearly half a century. *See, e.g.*, Ch. 325, 1942 Va. Acts 500.

The *Davis* decision had two significant impacts on these states. First, the states affected by this unanticipated change in the federal law were put to the task of analyzing their tax systems and enacting amendments to bring their systems into compliance with *Davis*, often resulting in a loss of anticipated and already budgeted

revenues. Second, the *Davis* decision generated litigation in at least twenty-three states. This litigation presented two issues: (1) whether the states' pre-*Davis* or post-*Davis* tax systems were or are consistent with *Davis;* and (2) if not consistent, whether states may fulfill their constitutional obligation created by *Davis* by changing their tax systems for the future or whether states must in addition give remedial relief, such as refunds, for taxes imposed prior to *Davis.*[1] The latter issue in much of the state litigation may depend, to a greater or lesser extent, on whether *Davis* is retroactive.

Amici curiae submit that this issue should not be decided without the parties before the Court fully briefing and presenting oral argument on that issue. The parties in the instant case have not sought certiorari on this issue nor briefed it to the Court. Reserving determination on the retroactivity issue is especially appropriate in this case for several reasons. The retroactivity of the Court's decision could have a massive financial impact on parties not present or represented. Refund claims against states affected by *Davis* are estimated to

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[1] In some states, taxpayers also brought suit pursuant to 42 U.S.C. § 1983, seeking to impose personal liability on state officials and to collect attorney's fees. In the only federal case to reach this issue, Judge J. Harvey Wilkinson, writing for the Fourth Circuit Court of Appeals, held that the state revenue official was entitled to qualified immunity. *Swanson v. Powers,* 937 F.2d 965 (4th Cir. 1991), *cert. denied,* 60 U.S.L.W. 3478 (U.S. Jan. 13, 1992) (to hold official liable would create miscarriage of justice because law not clearly established prior to *Davis*).

exceed $2.2 billion.[2] Moreover, as discussed below, the retroactivity issue is one of particular complexity based on recent Supreme Court precedent. *See Beam, supra; American Trucking Associations, Inc. v. Smith*, 110 S. Ct. 2323 (1990) (*"ATA"*); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990) (*"McKesson"*).

III. THE RETROACTIVITY ISSUE IS TOO COMPLEX AND FAR-REACHING TO BE DECIDED WITHOUT FULL BRIEFING AND ARGUMENT.

Because Michigan stipulated to the payment of a refund to the taxpayer in *Davis*, the question of the retroactivity of *Davis* was not presented in that case. *Davis*, 489 U.S. at 817. As state courts were called upon to decide the question of refunds under their state laws following *Davis*, some states determined that state law mandated refunds irrespective of the retroactivity or prospectivity of *Davis*. *See, e.g., Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 110 S. Ct. 718 (1990). Other state courts determined that taxpayers were not entitled to refunds on independent state law grounds. *See, e.g., Harper v. Virginia Department of Taxation*, 241 Va. 232, 401 S.E.2d 868, *vacated and remanded*, 59 U.S.L.W. 3864 (U.S. June 25, 1991), *aff'd*, 243 Va. ___, 410 S.E.2d 629 (1991), *petition for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 15, 1991) (No. 91-794).

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[2] *See* W. Hellerstein, *Preliminary Reflections on McKesson and American Trucking Associations*, 48 Tax Notes No. 3, 325, 326 (July 16, 1990).

In determining the application of federal law to a state's obligation under state law to refund taxes imposed prior to *Davis*, state courts looked to this Court's 1990 pronouncements in *ATA* and *McKesson* for guidance. Most recently, state courts have looked to the Court's 1991 decision in *Beam*. A review of *Beam* illustrates the complexity of the retroactivity issue now being litigated in numerous state courts.[3]

Justice Souter in *Beam*, like the four dissenting Justices in *ATA*, distinguishes between retroactivity as a choice of law principle and retroactivity as a remedial principle. 111 S. Ct. at 2443. Justice Souter explains that the choice of law aspect of retroactivity presents a federal question where the rule at issue derives from federal law. However, in tax cases such as the present one, "the remedial inquiry is one governed by state law, at least where the case originates in state court." *Id.*

It appears from this statement that nothing in *Beam* precludes the denial of refunds under state law in a case such as the present one, regardless of this Court's decision on the substantive issue presented. This conclusion is supported by Justice Souter's statement on the narrow reach of the *Beam* decision:

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[3] Five opinions were written in *Beam*, none of which commanded a majority of the Court. The lead opinion, written by Justice Souter, was joined by only Justice Stevens. Justice White wrote a separate concurrence. Justices Blackmun, Marshall and Scalia – in two separate opinions, each joined by the three of them – also concurred separately. And there was a dissent written by Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy.

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.
>
> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interest entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal.

111 S. Ct. at 2448.

Following his distinction between retroactivity as a choice of law principle and as a remedial principle, Justice Souter also distinguishes between selective prospectivity and pure prospectivity, citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*"Chevron Oil"*), as an example of pure prospectivity. 111 S. Ct. at 2443. In selective prospectivity, the Court may apply a rule of law to the litigants in one case but not to others whose facts arose

before the announcement of the new decision. While Justice Souter rejects selective prospectivity as a choice of law principle, he does not "speculate as to the bounds or propriety of pure prospectivity." *Id.* at 2448.

The Court in *Davis* did not apply the rule there announced retroactively since Michigan had removed the issue by conceding to the payment of refunds. Accordingly, it appears that *Davis* represents a proper case for the application of pure prospectivity.

It also appears from *Beam* that *Chevron Oil* remains the proper test for the determination of prospectivity. The three dissenting Justices in *Beam*, Chief Justice Rehnquist and Justices O'Connor and Kennedy, clearly adopt this standard. 111 S. Ct. at 2451 (*Chevron Oil* describes Court's long-established procedure for determining whether new rule applies to conduct occurring before decision). Justice White, in his opinion concurring in the result in *Beam*, reaffirms his view, as expressed by Justice O'Connor for the plurality in *ATA*, that in the proper case a new rule of law will not apply retroactively based on a *Chevron Oil* analysis. 111 S. Ct. at 2449. Finally, while Justice Souter does not "speculate" as to the "bounds" of pure prospectivity, he does not suggest that he would overrule *Chevron Oil* but only that he would not apply it "to the end" of selective prospectivity. 111 S. Ct. at 2445.

In summary, this Court's decision in *Beam* raises four issues for the instant case: (1) whether *Davis* is a proper case for the application of pure prospectivity; (2) if so, whether *Chevron Oil* applies to determine the prospectivity of *Davis;* (3) if so, whether *Davis* satisfies the *Chevron Oil* standard; and (4) if the answer to all or any of the

preceding questions is no, whether this Court's choice of law conclusion precludes an ultimate denial of remedial relief that is based on state law grounds.

These issues are complex, interrelated and far-reaching. Amici curiae urge this Court to refrain from deciding these issues until they can be fully briefed and argued.

CONCLUSION

The Court should affirm the ruling of the court below. If the Court does not so affirm, it should not decide whether its decision is retroactive until the question is fully briefed and argued to the Court.

Respectfully submitted,

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